ONG HENG HWA REALTY SDN. BHD. v. TEOH CHAI SIOK

[O.C.J. (Syed Agil Barakbah J.) May 15, 1976]
[Alor Star — Civil Suit No. 26 of 1972]

Landlord and Tenant — Claim for vacant possession — Position of tenant of a void lease — Application of rule of equity — Kedah Land Enactment, ss. 46, 92 & 94 — National Land Code, ss. 4(1), 206(3), 221(3)(a) & (b).

Equity — Application of rule — Position of tenant of void lease.

This was a claim for vacant possession against the defendant-tenant by the plaintiffs, the registered owners of the premises. The defendant refused to quit on the expiry date of the notice to quit served on him by the plaintiffs. Instead, the defendant argued that the tenancy had not been terminated by such notice and averred that the tenancy was for a fixed duration of forty years and that he was not in arrears of rent or in breach of any covenants contained in a written agreement. The defendant counterclaimed and asked for, *inter alia*, specific performance of the said agreement and that the plaintiffs be ordered to execute a registrable lease of the land on which the said premises stood erect pursuant to the National Land Code for a residue term of 24 years.

The plaintiffs in their reply and defence to the counterclaim denied the counterclaim, and contended, that the agreement was void for want of registration.

One of the issues before the court was what was the position of the defendant who relied on a void lease.

Held, dismissing the plaintiffs' claim, and allowing the defendant's counterclaim: (1) the defendant had attorned tenancy to the new landlords, and continued to pay the monthly rents pursuant to the agreement until receipt of the notice to quit. The plaintiffs had due notice of such tenancy agreement, and were bound to abide by the covenants and conditions stated therein on their taking over the premises as the new landlords;

(2) although an agreement might be a nullity as a lease, it could be a good enforceable agreement as a lease under which the registered proprietor had undertaken the obligation to grant a lease; it was valid as an agreement for a lease enforceable in equity;

(3) the parties were certain as to the period of tenure and the terms of conditions thereof. Their intention was to have a lease for forty years and the agreement had been partly executed by possession having been taken under it and the tenant having all along complied with the terms and stipulations thereof.

Cases referred to:-

(1) *Hunt* v. *Luck* [1902] 1 Ch. 428, 433.
(2) *Margaret Chua* v. *Ho Swee Kiew & Ors.* [1961] M.L.J. 173, 175.
(3) *Yong Tong Hong* v. *Siew Soon Wah & Ors.* [1971] 2 M.L.J. 105, 107 F.C.
(4) *Lee Lum Soh* v. *Low Ngah* [1973] 1 M.L.J. 97, 99.
(5) *Inwards & Ors.* v. *Baker* [1965] 2 W.L.R. 212, 213.
(6) *Liew Ah Hock* v. *Malayan Railway* [1967] 1 M.L.J. 53, 55.
(7) *Parker* v. *Taswell* (1858) 2 De G. & J. 559.
(8) *Martin* v. *Smith* L.R. 9 Ex. 50, 52.
(9) *Zimbler & Anor.* v. *Abrahams* [1903] 1 K.B. 577.
(10) *In re Fireproof Doors, Ltd.; Umney* v. *The Company* [1916] 2 Ch. 142, 151.
(11) *Inter-Continental Mining Co. Sdn. Bhd.* v. *Societe Des Etains De Bayas Tudjuh* [1974] 1 M.L.J. 145, 148.
(12) *In re King's Leasehold Estates* (1873) L.R. 16 Eq. 521.
(13) *Siew Soon Wah & Ors.* v. *Yong Tong Hong* [1973] 1 M.L.J. 133.

CIVIL SUIT.

W.H. Tan (*P.S. Gill* with him) for the plaintiffs.
Lim Kean Chye for the defendants.

Syed Agil Barakbah J.: The plaintiffs, a limited company incorporated in the States of Malaya, are the registered owners of the premises known as No. 53, Jalan Tunku Ibrahim, Alor Star, (hereinafter called "the said premises") and the defendant is the tenant of the said premises at a rental of $300 per month. On September 30, 1970, the plaintiffs served on the defendant notice to quit terminating the tenancy on November 30, 1970. (p. 13 of Agreed Bundle, Ex. "A"). The defendant refused to quit. The plaintiffs now claim vacant possession of the said premises, mesne profits at the rate of $600 per month from December 1 1970 to the date of vacant possession and costs.

This suit was originally filed in the Sessions Court, Alor Star, but was transferred to the High Court pursuant to order of court dated November 14, 1971, in Alor Star High Court Originating Summons No. 669 of 1971.

Mr. W.H. Tan with Mr. P.S. Gill appeared for the plaintiffs and Mr. Lim Kean Chye for the defendant.

In his statement of defence the defendant admits being tenant of the said premises at the monthly rental of $300, of having received notice that the plaintiffs are the newly registered owners thereof and of the notice to quit the said premises. However, he denies that the tenancy has been terminated by such notice and avers that it is bad in law and not valid on the ground that the tenancy is for a fixed duration of forty years and that he is not in arrears of rent or in breach of any covenants contained in a written agreement. The defendant also filed a counterclaim for: —

(1) a declaration that the said agreement is binding on the plaintiffs and ought to be specifically performed and carried into execution;
(2) an order for the plaintiffs to execute a registrable lease of the land on which the said premises stands erect pursuant to the National Land Code for the residue term of 24 years; and
(3) costs.

The plaintiffs in their reply and defence to the counterclaim, apart from denying the counterclaim, deny the said agreement to be binding on them on the ground that (a) it is void for want of registration, and (b) they are not a party to the said agreement.

It was conceded by the parties that: —

(1) The alleged agreement was executed between the defendant and the former landlords on July 28, 1955.

(2) The plaintiffs never collected the rents on the premises since they acquired it.

(3) Notice to quit the said premises dated January 1, 1970, was served by the plaintiffs on the defendant terminating the tenancy on March 31, 1970, and subsequently a second notice on which the plaintiffs are now relying was also served on the defendant.

(4) The tenancy agreement with the defendant was executed by O.B.E. and O.S.K. as the landlords; O.B.E. is the present shareholder of the plaintiff company with eleven children of O.S.K. who died on April 24, 1969, and the latter's brother O.S.S. who was not a party to the said agreement and not the owner of the premises.

Since the main issue involves points of law, no evidence was called by the plaintiffs' counsel but the defendant was called to testify briefly on his counterclaim. Taking into consideration the arguments put forward by both learned counsel, in my considered opinion, in order to determine whether the notice to quit dated September 30, 1970, (hereinafter called "the notice") is valid or otherwise, it is necessary to consider: —

(1) whether the unregistered agreement for a fixed term of 40 years is valid or otherwise and/or binding on the defendant; and

(2) whether the defendant is entitled to (i) the order for specific performance of the said agreement; and (ii) the order for the execution of a registrable lease of the said land on which the premises now stands erect *i.e.* Surat Sewa Tanah Raja No. 95 Allot. 50, Section 2, Town of Alor Star, pursuant to the National Land Code for the residue term of 24 years.

Before going into the merits of the arguments, I feel it necessary for me to deal with the point raised by the plaintiffs in their reply and defence to the counterclaim. It is true that the plaintiff company is not a party to the said agreement. Nevertheless, in the light of what is conceded at paragraph 4 above and the fact that the defendant thereafter attorned tenancy to the new landlords and continued to pay the monthly rents pursuant to the agreement until receipt of the notice to quit, I am of the considered judgment that the plaintiffs having due notice of such tenancy agreement, are bound to abide by the covenants and conditions stated therein on their taking over of the said premises as the new landlords. The plaintiff company although a separate entity as such is more a family enterprise and it is improbable to accept that the shareholders have no such notice. It is the duty of the purchaser who has notice that the vendor is not in possession of the property to make inquiries from the tenant in possession and find out from him what his rights are. If he does not choose to do that then whatever title he acquires as purchaser will be subject to the title or right of the tenant in possession. (Per Vaughan Williams L.J. in *Hunt* v. *Luck*[1]).

On the first question, since the agreement was executed in the year 1955, it falls within the ambit of section 46 of the Kedah Land Enactment. The section allows a registered proprietor of land to lease his land to any individual person or a company for a period not exceeding thirty years. Secondly, section 92 requires any lease for any term exceeding one year to be registered by the proprietor and lessee. Any other lease not exceeding one year is valid without registration under section 94 thereof. It is clear, therefore, that the said agreement is incapable of registration as a lease and incapable of conferring upon the purported lessee any real interest in the land. Further, by virtue of section 4(1) of the National Land Code it is void for non-registration under section 221 of the Land Code. So it is a nullity as a lease and rendered void. (See *Margaret Chua* v. *Ho Swee Kiew & Ors.*,[2] per Thomson C.J. (as he then was); *Yong Tong Hong* v. *Siew Soon Wah & Ors.*,[3] *Lee Lum Soh* v. *Low Ngah*,[4] per Mohamed Azmi J.).

Now, what is the position of the defendant who relies on a void lease? It is an accepted principle as held in *Margaret Chua's* case, *supra* that although an agreement might be a nullity as a lease, it could be (and indeed it was in that case) a good enforceable agreement as a lease under which the registered proprietor had undertaken the obligation to grant a lease; it was valid as an agreement for a lease enforceable in equity. There are strong authorities both English and local which are discussed in the cases cited above. I will only deal with the relevant ones. When will equity come to the aid of the lessee in order that the principle will apply? In this regard Mohamed Azmi J. in *Lee Lum Soh's* case, *supra*, having discussed relevant authorities, concluded that a tenant relying on an agreement void as a lease for non-registration can only be protected in equity if he has equitable grounds. Where a person has expended money on the land of another in the expectation of being allowed to remain in occupation, induced and encouraged by the owner of the land, an equity was created such that the court will protect his occupation of the land, and the court has power to determine in what way the equity so arising could be satisfied (*Inwards & Ors. v. Baker*).[5] The money laid out on the land or expended on the land of another means money directed towards physical or structural improvements to the land such as the erection of houses, wharves, jetties, etc. (Per Winslow J. in *Liew Ah Hock* v. *Malayan Railway*).[6] In *Yong Tong Hong's* case, *supra*, the Federal Court applied the principle in *Inwards* v. *Baker, supra*. The appellant having paid a sum of $8,000 on behalf of the then proprietor to the building contractor was let into occupation of the ground floor of the premises on its completion as a tenant at a rental of $150 per month under an agreement whereby the landlord agreed to give a permanent tenancy and not to increase the rent of the premises as he liked or eject the tenant. The property was subsequently transferred to the respondent who having failed to get an increase of rent from the appellant, gave notice terminating the tenancy and brought action for recovery of possession of the premises. It was held as the respondent had expended money on the land of another in expectation of being allowed to remain in occupation, equity would protect his occupation of the land. These are instances where money has been expended by the tenant in possession who has done so in the hope that he will be allowed to remain in occupation of the premises belonging to the landlord. There are however instances where equitable remedy of specific performance has been allowed where no such expenditure of money has been incurred by the tenant in possession, even though the agreement executed between him and the landlord is void as a lease. In *Margaret Chua's* case, *supra*, a loan of $30,000 was advanced by the tenant to enable the landlord to build two shophouses and in return the latter gave the tenant a lease of the buildings on completion for a term of 25 years. Although the agreement was void as a lease for non-registration, it was valid as an agreement for lease enforceable in equity. The agreement for a lease was a binding contract, failure to comply with which was a breach of contract. The *ratio decidendi* in *Parker* v *Taswell*[7] was followed, as was done in a number of subsequent

cases, including *Martin* v. *Smith*,[8] *Zimbler & Anor.* v. *Abrahams*,[9] *In re Fireproof Doors, Ltd. Umney* v *The Company*,[10] *Yong Tong Hong* v. *Siew Soon Wah & Ors.*, *supra*, and *Inter-Continental Mining Co. Sdn. Bhd.* v. *Societe Des Etains De Bayas Tudjuh*.[11]

In *Parker* v. *Taswell*, *supra*, the instrument was a lease of present demise which was not under seal and therefore void as such by reason of section 3 of the Real Property Act (8 & 9 Vict. c. 106). It was treated as an agreement for a lease and specific performance was granted. Lord Chelmsford said (at p. 570):—

"If the Legislature had intended to deprive such a document of all efficacy, it would have said that the instrument should be 'void to all intents and purposes'. There are no such words in the Act. I think it would be too strong to say that because it is void at law as a lease, it cannot be used as an agreement enforceable in equity, the intention of the parties having been that there should be a lease, and the aid of equity being only invoked to carry that intention into effect."

His Lordship further said:—

"It must be borne in mind that this agreement has been partly executed by possession having been taken under it; and there are many authorities to show that in such a case the court will strain its power to enforce a complete performance.... The agreement, moreover, is admitted to be sufficiently certain as to all the substantial parts of it, and the only portions of it to which uncertainty is attributed are subordinate matters. No authority has been cited to show that in such a case specific performance may not be decreed."

Similarly in *Martin* v. *Smith*, *supra*, which dealt with an instrument not under seal, Kelly C.B. followed the decision in *Parker* v. *Taswell*, *supra*. Again in *Zimbler* v. *Abrahams*, *supra*, the Court of Appeal was concerned with a document signed by the agent of the owners of a house which purported to "have let" to the defendant at a weekly rental. It was agreed that the landlord would not raise the rent nor give notice to quit so long as the tenant occupied the house and paid rent regularly. If the tenant wished to move out, the landlord promised to return the £6 already paid by the tenant to him on the former taking possession of the premises. The plaintiffs, treating the defendant as a weekly tenant, gave him notice to quit and brought the action for vacant possession of the house. It was held that the document could not, having regard to its terms, be treated as creating a weekly tenancy, and that whether it purported to be an attempt to create an immediate demise for life of the defendant, which was void at law as not being by deed, or an agreement to grant a lease for life of the defendant, he was entitled to specific performance. At page 582, Vaughan Williams L.J. said:—

"I have then to look at the document and ask myself what interest was agreed to be granted by it. I have a difficulty in saying that the interest was to be merely a tenancy from week to week, for that would be to give effect to the earlier part of the document and none to the latter portion. If that is not to be taken as the meaning, the alternative seems to be that it was intended to grant to the defendant a lease of the house for his life subject to two conditions, one that the lessor might turn him out if he did not pay his rent regularly, and the other that the defendant could determine his own life estate by moving out."

On the same page, Stirling L.J. said:—

"Having regard, however, to the decision of Lord Chelmsford in *Parker* v. *Taswell*, we have in this case a document which, though it may have been intended to operate as a demise, may still be looked upon as an agreement for a lease capable of specific performance. If the true construction of the document is that it was not a demise which turned out to be inoperative, but an agreement for a lease, the case for specific performance is *a fortiori*."

A much earlier case is *In re King's Leasehold Estates*[12] which was quoted with approval by Viscount Dilhorne when delivering the judgment of their Lordships in the Privy Council in *Siew Soon Wah & Ors.* v. *Yong Tong Hong*.[13] The brief facts in that case are that A. who had only a leasehold interest in certain premises to expire in 1881, agreed in writing to let the premises to B. at a rent of £36 payable quarterly. He agreed not to raise the rent nor issue notice to quit so long as B. continued to pay the rent when due. He also agreed verbally to allow B. to occupy the premises as tenant for so long as B. desired to remain not exceeding his term of lease. A railway company contracted to purchase B.'s interest in the premises, disputed B.'s title to such interest and paid the purchase money into court. It was held that the relationship of landlord and tenant made B. a purchaser for valuable consideration to the extent of his lease; that the Statute of Frauds was no bar in equity to B.'s claim; that B. was not a mere tenant from year to year, but had a right to retain possession as long as his landlord's interest existed, and to enforce that right in equity and that he was entitled to the purchase-money. At page 526, Sir R. Malins, V.C. said:—

"The relation of landlord and tenant, I have already said, is a consideration; it is not necessary in a contract for a lease to pay any money; the fact that he has agreed to take the lease is itself a consideration...."

At page 527 His Lordship continues in much stronger terms:—

"I am clearly of opinion that a tenant with such an agreement would not be allowed by this court to be turned out of possession, although he had no defence at law. If he filed a bill here I am perfectly satisfied that this court would restrain the landlord, and on these grounds, therefore, I am of opinion ... that he had an interest under this contract...."

The net result of all these authorities points to the conclusion that a contract wherever possible should be construed so that the intention of the parties may be carried out rather than frustrated. (Per Ong C.J. (as he then was) in *Yong Tong Hong's* case, *supra*). Similarly in *Margaret Chua's* case, *supra*, Thomson C.J. (as he then was) said at page 174:—

"The case came on for hearing before Barakbah J. He took the view that the agreement ... was a binding contract dealing with a loan of $30,000 by the respondents to the appellant without interest and obliging the appellant to grant the respondents a lease of the land in question for twenty-five years. He considered that the respondents would have been entitled to an order of specific performance.... For myself I am in such entire agreement with the very careful judgment of Barakbah J., that I was at first disposed to do no more than express that agreement...."

The agreement in the instant case is for a lease of forty years, the landlord being the registered owner at the material time. The rental for the whole duration of the lease was $260 per month, the first rental being payable on August 31, 1965, and subsequently on the first of each succeeding month. The defendant as agreed paid a deposit of two months' rent of $520 in advance in respect of the premises as deposit which would be forfeited if the defendant failed to hand over peaceful possession of the premises to the

landlord on the expiration of the lease. Either party was at liberty to determine the lease at the end of the term thereby created by delivering on the other party at least two months' notice in writing. So long as the tenant performed and observed all the terms and conditions of the lease and paid all rents regularly up to such determination, the lease would continue until the term thereby stipulated, whereupon immediately after, it shall cease and become void without prejudice to any claim by the landlord in respect of any antecedent breach of any covenant or condition contained therein. The landlord is only entitled to serve notice to quit on the tenant if he commits any breach of the stipulation during the period of the lease including the failure to pay the monthly rental due. The expression 'landlord' in the recital includes, where the context so admits, the person or persons for the time being entitled to the reversion immediately expectant on the determination of the term thereby created. It was also covenanted that the defendant as tenant should pay all the rates and taxes such as water, electricity and conservancy rates except the quit rent. The landlord retained possession of a room in the front portion of the ground-floor for many years and had full use of the water, electricity and lavatory "without any interruption, molestation or disturbance whatever" at the expense of the tenant. When the landlord vacated the room, the defendant, according to the agreement, went into occupation thereof and henceforth paid an increased monthly rental of $300. The tenant was also responsible to keep the premises in good and tenantable condition and repair upon notice given by the landlord requiring such repairs to be carried out. For that purpose the tenant would have to permit the landlord or his agent to enter upon the premises or any part thereof in order to view the condition.

Taking into consideration the facts and circumstances, it is clear there was in the minds of the parties the certainty as to the period of tenure and the terms of conditions thereof. Their intention was to have a lease for forty years and the agreement had been partly executed by possession having been taken under it and the tenant having all along complied with the terms and stipulations and paying the rents regularly without fail.

In my opinion the defendant should be entitled to the order of specific performance of the agreement.

As regards the second prayer in his counterclaim, I would quote Ong C.J. (as he then was) in *Yong Tong Hong's* case, *supra* at page 108: —

"Here it seems to me that no strain will be imposed upon the powers of this court to give effect to the expressed intention of the parties by holding that the agreement was one for the grant of as long a lease as the law allows. Section 221(3)(b) of the National Land Code provides that the maximum term for a lease of a part only of alienated land shall be 30 years. The law permits no longer term and this court should grant the appellant no less."

In the next paragraph, His Lordship continues: —

"I need hardly add that the respondents take the premises subject to the agreement which binds their predecessor in title to give the appellant a lease of the premises.... Although the agreement was not a proper instrument for registration as a lease the authorities are clear that it may be treated as an agreement for a lease. The validity of contracts relating to alienated land or any interest therein is explicitly declared in section 206(3) of the National Land Code."

In the present case, it seems to me to be a lease of the whole land. "Surat Sewa Tanah Raja" is lease of State land as defined in section 2 of the Kedah Land Enactment. Under the National Land Code it is alienated land for which a lease of the maximum term of ninety-nine years is allowed under section 221(3)(a). I therefore order the plaintiffs to execute a registrable lease for the residue term of twenty-four years.

In the circumstances the plaintiffs' claim for vacant possession of the premises and for mesne profits is dismissed with costs on the ground that the notice served on the defendant is of no effect and therefore rendered invalid.

I would allow the defendant's counterclaim with costs.

Order accordingly.

Solicitors: *Cheang Lee & Ong; Lim Kean Chye & Co.*

RETNAM PILLAI v. BAHAGIA TRADING AGENCY

[A.C.J. (Mohamed Zahir J.) May 24, 1976]
[Seremban — Civil Appeal No. 8 of 1975]

Practice and Procedure — Liquidated claim — Appellant granted adjournments several times to file defence or settle matter — Judgment finally entered against appellant — Appellant present in court at material time — Appeal against judgment — Subordinate Court Rules, 1950, O. 1 r. 2, O. 19 rr. 3 & 4, O. 36 rr. 9 & 14.

The appellant had failed to file a defence to the respondents' liquidated claim for goods sold and delivered in the sum of $1,471.25. On the first date for mention, the appellant's application to file the defence was allowed and on the second date, the respondents agreed to the appellant's request for time to settle the matter. On the third occasion the appellant again requested for time and this request was granted as the final one. On the last date again the appellant had failed either to settle the matter or to file the defence. The learned magistrate then entered judgment against the appellant, who was present in court at the material time.

The appellant appealed against the decision of the learned magistrate who refused the application of the appellant to set aside the magistrate's own judgment and to order the case reinstated for hearing. The learned magistrate contended that the judgment was entered *inter partes* hence he had no power to set it aside and the appellant's remedy was to appeal against the judgment.

Held, dismissing the appeal: (1) it is the intention of the legislature that in cases of *inter partes* judgment the setting aside of the said judgment should be by way of appeal;

(2) the appellant, in his application to set aside the judgment of the magistrate, had failed to base his application on the irregularities of the proceedings;

(3) the judgment in the instant case was irregular but by virtue of Order 36 rule 9 it will not render the proceedings void unless the court shall so order. The power to set aside any irregular proceedings under rule 9(1) appears to be confined only to proceedings but not to the judgment already entered.

Cases referred to:-

(1) *Abdul Majeed* v. *Boor Singh* [1970] 2 M.L.J. 4.
(2) *Leow Boke Chooi* v. *Asia Motor Co. Ltd.* [1967] 2 M.L.J. 109.
(3) *Rengasamy Pillai* v. *Comptroller of Income Tax* [1970] 1 M.L.J. 234.